Event summary of Session 2

Understanding the basic structure of the international legal systems, including Hong Kong, and where forensic accountants are needed for proceedings

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A. The Legal System

Source of law in Hong Kong

- Hong Kong Basic Law ("BL"):
  - ✓ It provides the basic framework of Hong Kong legislations. No law shall be enacted that contravenes the main provision under the Basic Law, according to BL, Article 17. Article 160 allows the Standing Committee of the National People's Congress ("NPCSC") to declare laws as contravening the basic law.
  - ✓ If it is discovered that a law is inconsistent with the Basic Law, it will be declared void and will have retrospective effect.
  - ✓ Common law from superior courts in other countries are not binding per se, as the local courts must be subject to compliance with the Basic Law.

- Legislation enacted by the Legislative Council ("LegCo")
  - ✓ This is the legislature branch of the HKSAR.
  - ✓ Its powers to legislate are conferred by Article 17: "The Hong Kong Special Administrative Region shall be vested with legislative power"; these powers are not unlimited, subject to controls by the NPCSC which is able to strike down incompatible legislation
  - ✓ But certain legislative powers of the NPCSC are reserved under Article 18 of Basic Law. National laws will not apply in Hong Kong except for those listed in BL, Annex III. The NPCSC may add to or delete from the list after consultation.
  - ✓ Laws listed in Annex III are confined to those relating to defence and foreign affairs, as and other matters outside the HKSAR's autonomy.

- Case Law
  - ✓ When making a decision/judgment, the court should make reference to both the statutory provisions and any previous decisions made in a similar case. If the court decides to overrule a previously held decision, this must be supported and justified with strong reasons.
  - ✓ LegCo enacts legislation and the judiciary interprets the legislation in case of ambiguity. However, the judiciary's power of interpretation is not unlimited. The power of interpretation of the Basic Law is ultimately vested in the NPCSC, according to BL, Article 158.
  - ✓ Case studies: Ng Ka Ling V. Director of Immigration
    - The Court of Final Appeal decided that the children of parents who had the right of abode in Hong Kong also had the right of abode in Hong Kong, regardless whether they could obtain an approval from a relevant Mainland authority.
    - This decision, if followed, could have resulted in a possible immigration problem. The then chief executive sought an interpretation by the NPCSC of the relevant parts of BL Articles 22 and 24.
    - The NPCSC stated that children born outside Hong Kong will only be qualified for the right of abode if at least one of their parents has earned a permanent resident status at the time of birth of the children. It also ruled that "right of abode

applicants" must apply for permission from Mainland authorities before entry into Hong Kong.

- Customary laws

  ✓ The court may recognise and enforce Chinese customs or customary rights in relation to land in the New Territories under New Territories Ordinance (Cap. 97).

B. The National Security Law and its Impact on Dispute Resolution

- Effective from 1 July, National Security Law ("NSL") under BL, Article 18 is put in place to prevent, curb and sanction acts of secession, subversion, terrorism and collusion with foreign forces.

- Notwithstanding Hong Kong's common law system, under Article 57 of the NSL, the Criminal Procedure Law of the Mainland and other related national laws will apply to procedural matters.

- Although international parties may favour other places for resolving disputes, Hong Kong remains a popular choice for China related disputes,.

C. Common Law vs Civil Law Systems

	Common Law	Civil Law
Legal system	• Adversarial system ○ Lawyers will only be responsible for putting forward evidence that supports their party's own case. ○ Judges will take a neutral stance and a proactive role.	• Inquisitorial System ○ Judge directs trial in the search for truth. ○ Judges mainly concerned with the application of the written law to a wide spectrum of facts>
Legal proceedings	• Led by the parties to the legal proceedings. No involvement by the judge.	• Led by the judge
Source of law	• Written and unwritten law • Statute (legislation) and case law	• Written law • Civil Code

D. The Court Structure

Court	Jurisdiction
Court of Final Appeal ("CFA")	• Highest appellate court • Comprises the Chief Justice, three permanent judges and a non-permanent judge from HK or another common law jurisdiction • The CFA is bound by binding interpretations of the BL by the NPCSC.
High Court	• Comprises (1) the Court of Appeal ("CA") and (2) the Court of First Instance ("CFI")

	• Hears appeals on civil and criminal matters, and has unlimited jurisdiction • Further appeals need to be made to the Court of Appeal, but leave (i.e. an approval) must first be sought. • Bound by the previous decisions from higher courts
District Court	• Has limited jurisdiction in civil and criminal matters; in civil matters it has jurisdiction to hear monetary claims up to HK$3 million, while the court can impose up to an imprisonment of seven years. • Appeals need to be made to the Court of Appeal. • Bound by the previous decisions from higher courts.
Magistrates Court	• Exercises criminal jurisdiction over a wide range of offences with a general limit of two-year imprisonment or a fine of HK$100,000 • Appeals need to be made to the Court of First Instance • Cases of the offenders under the age of 16 will be handled at the Juvenile Court. • Not bound by their previous decisions but by the same of higher courts
Tribunals and Coroner's Court	• Comprises of Land Tribunal, Labour Tribunal, Small Claims Tribunal, Obscene Articles Tribunal, Coroner's Court.

E. Criminal Justice System

- Classification of offences

  ✓ Indictable offences
    - the provision providing for the offence clearly states that the crime is indictable
    - most indictable offences, which are less serious, can be tried summarily with the prosecution's consent in the Magistrate Court, see below, subject to the 2nd Schedule to the Magistrates Ordinance which sets out limitations on the courts in hearing specified indictable offences.
    - the prosecution will usually decide the appropriate venue by looking at the court's power to hand down the likely sentence and the relevant sentencing tariff.

  ✓ Summary offences
    - all other offences that are not indictable.
    - a summary offence is generally tried in the Magistrates' Court which has summary jurisdiction
    - a summary charge involving sexual abuse or cruelty to children may be transferred to the Court of First Instance

  ✓ Excepted offences
    - Setting out in Schedule 3 of the Criminal Procedure Ordinance.
    - the Magistrates or Judges are barred from imposing a suspended sentence of imprisonment, if the offence is one of the excepted offence under the above schedule.

- Major law enforcement agencies in Hong Kong

  ✓ The Hong Kong Police Force
  ✓ Immigration Department

- ✓ Customs and Excise Department
- ✓ Securities and Futures Ordinance
- ✓ Independent Commission Against Corruption

- Important principles of prosecution code

  - ✓ Code 1.1 – A prosecutor is required to act in the general public interest, but independently as a "minister of justice". In making decisions and exercising discretion a prosecutor must act fairly and dispassionately on the basis of the law, the facts provable by evidence, other relevant known information and any applicable policy or guidelines
  - ✓ Code 12 – the disclosure obligation of the prosecutor disclose <u>all relevant or possibly relevant material,</u> available or known to the prosecution, <u>whether or not it assists in the proof of the prosecution case</u>.
  - ✓ Code 5 – The decision to prosecute includes two required components – (i) the admissible evidence available is sufficient to justify the instituting or continuing proceedings; and (ii) the general public interest must require that the prosecution be conducted

- Rights of accused

  - ✓ anyone arrested or detained on a criminal charge shall be brought promptly before a judge to exercise judicial power and is entitled to a trial within a reasonable time or to release, under Article 5(3) of the Hong Kong Bill of Rights.
  - ✓ no Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment, under BL, Article 28.
  - ✓ bail may be granted by the police or by the court to the accused pending trial, subject to the accused entering into a recognizance.
  - ✓ to appeal against conviction and/or sentence
  - ✓ to have legal representation
  - ✓ can hold back and choose not to disclose his/her conviction if the conviction is considered "spent" on the conditions that:
    - the relevant person convicted was sentenced to imprisonment for not more than 3 months or a fine not more than HK$10,000;
    - s/he was not convicted before the current offence; and
    - 3 years have lapsed after his/her conviction

- Right to appeal

  - ✓ In Hong Kong, everyone convicted of a crime has the right to have his/her conviction and sentence reviewed by a higher tribunal according to law. (Article 11(4) of the Hong Kong Bill of Rights)
    - Magistrates Court → Magistrates Court
    - Magistrates Court → CFI
    - District Court / CFI → CA
    - CA → CFA

- Rule of evidence in criminal trials

  - ✓ the presumption of innocence under the basic law

- ✓ the burden of proof **in general** lies with the prosecution; a person need to be guilty beyond a reasonable doubt
- ✓ roles of judges:
  - decides relevancy and admissibility
  - instructs jury on proper use of evidence and on the burden and standard of proof required

F. Civil Justice System

- Legal proceedings are brought by private individuals and/or legal person; these proceedings may be heard in different levels of courts, depending on the underlying amount of claims.

- Claims are however subject to the limitation period:
  - breach of a commercial contract: 6 years from the date on which the breach of contract happened.
  - Personal injuries claim: 3 years
  - Action for employees' compensation/work-related injuries: 2 years from the date from the accident that causes the injury.

- Fast route to settle civil cases:

  - default judgement

    The plaintiff can apply for default judgment when the defendant missed the deadline for either (a) filing a notice of intention to defend or (b) service of the defence; but this is only applicable to only monetary claims.

    This judgement can be set aside by the defendant subsequently if they can show that they have a real prospect of success of defending their case.

  - Summary judgement

    The plaintiff can apply for summary judgment if the plaintiff can show that the defendant has filed its notice of intention to defend, but has no defence or their defences are practically frivolous; and the case at hand does not involve any elements of fraud.

- Discovery stage - disclosure of documents

  - The relevant parties need to disclose all documents (in whatever forms and media) that relates to the matter in question (either directly or indirectly advance or damage the parties' own case) and are in the parties' possession, custody or power, but subject to:

    - ❖ Legal Advice Privilege: Protects (written or oral) confidential communications between a lawyer and a client for the purpose of giving or receiving legal advice.

    - ❖ Litigation Privilege: Any communications between the client and his solicitor or agent, or between one of them and a third party, will be privileged if they come into

existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence for use in the litigation

All these privileges allow a relevant party to resist disclosure of confidential and sensitive material

- Remedies available
  - Order of Payment
  - Specific Performance
  - Prohibitory Injunctions
  - Mandatory Injunctions
  - Mareva Injunctions, freezing the defendant's assets to avoid dissipation of assets
  - Anton Piller Orders, allowing the plaintiff to go to the defendant's premises to search and preserve specific property
  - Norwich Pharmacal Orders, requiring the defendant to disclose the identity and details of a third-party wrongdoer who is not a party to the legal proceedings

G. Rules of Evidence

- Admissibility of evidence
  - Relevancy – evidence must be relevant to a material issue to be admissible.
  - Legality – judges can exclude evidence if unconstitutionally obtained, either unfairly or illegally obtained.
  - Hearsay – out of court statement or conduct containing an expressed or implied assertion are NOT admissible, except in certain scenarios (e.g. declarations against interest by person now deceased; confession and/or admission statements made)
  - Previous convictions – In general, prosecutions cannot adduce evidence of previous convictions to attack the accused's character.
  - Admissions / confessions – self-incriminating statements. Only admissible if provided by the accused / defendant voluntarily, and without oppression and undue influence.
  - Where two parties are considering whether a piece of evidence is admissible or not, a *voir dire* proceedings may be held to determine the admissibility.
  - The standard of proof required for admissibility of evidence is, (1) beyond reasonable doubt that the evidence is true or, (2) notwithstanding that it may be true, that it was not obtained illegally. The burden will fall upon the prosecution to show this.

- Witnesses
  - Anyone who is competent and compellable will be able to give evidence in courts
  - Vulnerable witnesses (e.g. a sexual abuse victim under 17) will be protected by giving evidence via live television link, video recording, sworn witness statement, etc.
  - If the witness in court makes a statement that is inconsistent to the one he gave earlier, their credibility may be challenged.
  - Expert opinion evidence must be relevant, necessary and reliable.

H. Cross Border Challenges

- Cybersecurity Law (Mainland) governs the transfer of sensitive data by critical information infrastructure companies.

- Law of the People's Republic of China on Guarding State Secrets governs the transfer of state secrets.

- Sharing of the latest developments:

  - In 2013, an auditor failed to produce to the Securities and Futures Commission accounting records and audit papers based on the arguments of state secrets or commercial secrets.
  - In 2015, the Finance Ministry issued a direction to clarify that the scope of state secrets is extended to cover audit working papers.
  - In 2020, there was a rumour that the supervision/ evaluation of the relevant audit working papers might be passed to the Financial Reporting Council in Hong Kong.

I. Rise of Arbitration

- Confidentiality

  In most jurisdictions, the arbitration process will be kept confidential, against traditional litigation, where the details of the parties, hearings and judgments may be publicly available.

- Respect of Autonomy

  The arbitration procedures are determined by mutual agreement of the parties.

- Non-Intervention of Courts

  Unless the subject of the arbitration involves public interest, the court will not intervene with the decision of the arbitral tribunal if none of the parties submits an appeal to the court to dispute the tribunal's decision.

- Neutrality

  - The rules of the arbitration provide that the arbitrator must be neutral and independent to the parties.
  - The arbitrator is required to sign a declaration of neutrality and independence.
  - The parties have the right to request a substitution if there is doubt on the neutrality and independence of the arbitrator.

- Efficiency and cost-effectiveness

- Enforcement of awards

  - Finality**:** Except in special situations (e.g. where the arbitration agreement is invalid, the arbitrator acting *ultra vires* etc.), the court will generally not intervene with the decision of arbitral tribunal.
  - Enforceability: *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention") entered into force in 1959, whereby 163 of

the contracting states agree to recognise and enforce arbitral awards made in a foreign jurisdiction.

- ❖ Traditional litigation: Due to the principle of sovereignty, courts are generally more reluctant to enforce judgments concerning multiple jurisdictions.

J. Forensic Accountants as Experts

- When forensic accountants are required?
  - Dispute valuations and litigation support, e.g. to ascertain interests of disputed family members
  - Mediation and settlement negotiations support
  - Expert testimony
  - Expert determination
  - International arbitration
  - Data analytics in investigations on frauds and crimes, working hand in hand with legal practitioners
  - Insolvency investigations and contentious insolvency litigation support
- How forensic accountants can help
  - Investigations and Asset Tracing
    - Transaction documents
    - Fund flow / usage
    - Knowledge / authorisation conduct
  - Acting as Experts
- Examples of cases that need forensic accountants
  - Civil: Insolvency and restructuring, shareholders' disputes, banking disputes, family disputes, cross border enforcement, investor treaty disputes, etc.
  - Criminal: Bribery and corruption, money laundering and terrorist financing, insider dealing and market abuse
  - Civil and Criminal: Fraud
- Types of experts
  - Party-appointed expert
  - Single joint expert
  - Expert adviser
  - Tribunal-appointed experts (arbitration)
- Their common duties
  - Evidence should be seen to be independent
  - Witness should provide independent assistance to the court and be objective and unbiased
  - Make clear when a particular question or issue falls outside their expertise
  - State qualifications (if any)

    - Communicate change of views (if any)
    - Provide adverse party with documents referred to in reports

- What judges and tribunals look for?

    - Clarity
    - Impartiality and independence
    - Willingness to concede
    - Relevant expertise